This class of covenants is similar in principle to contracts made by employees not to divulge trade secrets learned by them in the course of their employment. Here, however, there is no question of restraint of trade, as equity recognizes a property right in such information even though it is not protected by patent or copyright.[18] Though Lord Eldon doubted whether it was practicable for equity to restrain the disclosure of business secrets,[19] the courts regularly enjoin a threatened breach of such a contract,[20] and according to the more recent view such a covenant may be implied in fact from a confidential relation between the parties.[21] Furthermore, even if a promise to that effect cannot be implied in fact, some courts hold that where the employee occupied a position of confidence, such an obligation may properly be imposed by law, and regard the disclosure of information obtained in the course of the employment, as an act in the nature of a breach of trust.[22] This result is to be justified on the ground that equity regards trade secrets as property.

A recent case, *The McCall Co.* v. *Wright* (N. Y. 1910) 43 N. Y. L. J. No. 3, illustrates the principles involved in the second class of negative covenants. The defendant, who was occupying a responsible position in the plaintiff's employ, was under a stipulation not to enter the service of a competitor during a specified period, but in violation of this agreement abandoned the contract and undertook to act as president of a rival company. Although the defendant's services were not of a special or unique charater, he had gained a comprehensive knowledge of the plaintiff's business methods and had become acquainted with a secret formula. The court, apparently recognizing that the covenant was not included in the contract as an additional method of enforcing the other provisions, treated it as an independent stipulation the object of which was to prevent the disclosure of business secrets and, therefore, properly upheld an injunction restraining the defendant from entering the service of a competing concern.

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WAIVER OF MORTGAGE LIEN BY ATTACHMENT.—Since at common law a mere incorporeal interest is not subject to execution,[1] the attachability of the mortgagor's interest in mortgaged property is determined primarily by the effect of the execution of the mortgage on the legal title. It follows then that upon the execution of a common law mortgage operating immediately to vest in the mortgagee a legal title subject only to the right of redemption,[2] there remains in the mortgagor no interest that can be subject to attachment.[3] It is, therefore, only when by express stipulation he is given possession for a definite period that the mortgagor's interest is subject to such pro-

[18]Hopkins, Unfair Trade 153; Peabody *v.* Norfolk (1868) 98 Mass. 452.

[19]Newbery *v.* James (1817) 2 Mer. 446.

[20]Salomon *v.* Hertz (1885) 40 N. J. Eq. 400; Thum Co. *v.* Tloczynski (1897) 114 Mich. 149.

[21]Merryweather *v.* Moore (1892) 61 L. J. Ch. 505; Lamb *v.* Evans (1892) 61 L. J. Ch. 681.

[22]Eastman Kodak Co. *v.* Reichenbach (N. Y. 1894) 79 Hun 183; Little *v.* Gallus (N. Y. 1896) 4 App. Div. 569.

[1]Thornhill *v.* Gilmer (Miss. 1845) 4 Sm. & M. 153; Scott *v.* Scholey (1807) 8 East 467.

[2]10 COLUMBIA LAW REVIEW 252.

[3]Badlam *v.* Tucker (Mass. 1823) 1 Pick. 389.

cess.[4] Even in such cases, the attaching creditor's right is limited to the possessory interest created by the agreement[5] and a possession terminable at the will of the mortgagee does not vest in the mortgagor an interest which can be reached by attachment process.[6] Through the influence of equitable principles the common law rule forbidding attachment of the mortgagor's interest has, however, been so modified that it is at present leviable by various methods provided by statute.[7] Although on strict legal theory it might have been held that since the mortgagee holds the legal title subject only to the right of redemption his interest should be liable to attachment, yet the courts have consistently refused to recognize such a doctrine.[8] But, after forfeiture of the mortgage condition, the title having become absolute in the mortgagee, his interest is, of course, subject to execution,[9] even if the mortgagor still remains in possession.[10] Where, on the other hand, the effect of a mortgage is merely to create in the mortgagee a lien on the mortgaged property,[11] there is no difficulty in holding the mortgagor's interest attachable[12] for the mortgagee's position in such cases is that of a creditor secured by a lien on his debtor's property.[13]

Since, however, the attaching creditor can seize only such interest as remains in his debtor,[14] it is evident that under either theory and regardless of whether or not the levy is made before[15] or after[16] breach of the condition, an attachment cannot operate to extinguish the rights of the other party to the mortgage. It would seem, therefore, that even if the process is sued out by the mortgagee it should not necessarily work a destruction of his rights. The courts are not, however, agreed as to the effect of such attachment and the rule is sometimes laid down that by the execution of an attachment on the mortgaged property the mortgagee thereby waives the mortgage lien.[17] Such a rule can, of course, be strictly applicable only in a jurisdiction where the mortgage creates a lien on the mortgaged property for under the common law theory the mortgagee's position is

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[4]Heflin *v.* Slay (1884) 78 Ala. 180; Hall *v.* Sampson (1866) 35 N. Y. 274.

[5]Peckinbaugh *v.* Quillin (1882) 12 Neb. 586.

[6]Tannahil *v.* Tuttle (1854) 3 Mich. 104.

[7]Angier *v.* Ash (1852) 26 N. H. 99; Prout *v.* Root (1875) 116 Mass. 410.

[8]Prout *v.* Root *supra;* Eaton *v.* Whiting (Mass. 1826) 3 Pick. 484; Huntington *v.* Smith (1822) 4 Conn. 235.

[9]See Ferguson *v.* Lee (N. Y. 1832) 9 Wend. 258.

[10]Jones, Chattel Mortgages 566; Ferguson *v.* Lee *supra.*

[11]10 COLUMBIA LAW REVIEW 252.

[12]Hamill *v.* Gillespie (1872) 48 N. Y. 556; First Nat. Bank *v.* Johnson (1903) 68 Neb. 641.

[13]Herman, Chattel Mortgages § 159.

[14]Manning *v.* Monaghan (1864) 28 N. Y. 585; Hull *v.* Carnley (1854) 11 N. Y. 501.

[15]Woodside *v.* Adams (1878) 14 N. J. L. 417.

[16]Saxton *v.* Williams (1862) 15 Wis. 320.

[17]Evans *v.* Warren (1877) 122 Mass. 303; Cox *v.* Harris (1897) 64 Ark. 213; 2 Cobbey, Chattel Mortgages § 746; Jones, Chattel Mortgages § 565.

that of an owner of the legal title rather than that of a lienor.[18] Under the common law theory, assuming that the mortgagor's interest has been made attachable, it seems quite possible to work out a destruction of the mortgagee's right of foreclosure on the ground that by asserting title in the mortgagor for the purpose of attachment he is estopped to later assert title in himself for purposes of foreclosure.[19] In such cases there is, of course, strictly speaking no reliance by the mortgagor on the mortgagee's representations and the estoppel must be based solely on the inconsistency of the positions which he has assumed. Consequently, some courts criticising these decisions as resting on a mere technicality have refused to adopt this doctrine.[20] Even in a jurisdiction where the mortgage does operate to create a lien in the mortgaged property it seems that, at least as between the original parties to the mortgage, a distinction might well be taken between an attachment for an independent claim and one for the debt secured by the mortgage. Since a waiver must, from its very nature, depend upon intent,[21] it is difficult to conclude that when the mortgagee attaches the property for a claim other than the mortgage debt he thereby intends to waive the mortgage lien,[22] for, obviously, the property may afford security for two co-existing claims.[23] If, however, the rights of subsequently attaching creditors are involved, it seems quite possible to say that having pursued his attachment to judgment and execution it is inequitable to allow him to set up his mortgage in order to defeat the creditor's rights.[24] Where, on the other hand, the mortgagee attaches the property for the mortgage debt the doctrine of waiver is much more applicable for in such cases it may fairly be inferred that he intended to substitute the attachment lien for the mortgage security.[25] Some courts have, however, even in such cases, preferred to consider the liens as cumulative security and consequently have refused to imply a waiver.[26]

In a recent case of first impression, *Stein* v. *McAuley* (Ia. 1910) 125 N. W. 336, a mortgagee, having recovered judgment in a suit on the mortgage note, attached the property and latter brought suit to foreclose. The court held that the attachment did not amount to a waiver of the mortgage lien nor did it estop him from later setting up the mortgage. Since the court treated the mortgage as having created a mere lien on the mortgaged property, it seems that, at least under the decisions last cited, this result may properly be supported. Under such a theory, it is difficult to see how any hardship is created by the co-existence of the mortgage and attachment liens for the mortgagee is benefited by having a judgment for any deficiency and the mortgagor a guaranty that the property will be sold to the high-

[18] 10 COLUMBIA LAW REVIEW 252.

[19] Evans *v.* Warren *supra;* Dix *v.* Smith (1899) 9 Okla. 124.

[20] Thuber *v.* Jewett (1854) 3 Mich. 295.

[21] Linwood *v.* Van Dusen (1900) 63 Oh. St. 183.

[22] Atkins *v.* Byrnes (1874) 71 Ill. 326.

[23] Scarfe *v.* Morgan (1838) 4 M. & W. 270.

[24] Haynes *v.* Sanborne (1864) 45 N. H. 429.

[25] Cox *v.* Harris *supra.*

[26] Barchard *v.* Kohn (1895) 157 Ill. 579; Byram *v.* Stout (1890) 127 Ind. 195.

est bidder and no more sold than is necessary to pay the debt.[27] Furthermore, even had the controversy arisen between the mortgagee and another creditor it seems that, since the attachment was dismissed before execution, the result might well have been the same for the attachment would not of itself furnish the intent essential to constitute a waiver nor would it necessarily have the effect to so mislead as to render the mortgagee's conduct in subsequently foreclosing the mortgage inequitable as to the creditor's rights.

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INJUNCTIVE RELIEF AGAINST ILLEGAL TAXATION.—In the exercise of its restraining power against the collection of illegal taxes equity is confronted by a situation which presents conflicting considerations. On the one hand, the imperative necessity that the collection of governmental revenues be unobstructed deters the court from granting its relief,[1] while on the other hand, the obvious impropriety of imposing upon a citizen the duty of paying an illegal and often fraudulent tax tends, under certain circumstances, to demand an exercise of its restraining power.[2] Although in some instances the latter consideration has prevailed thereby inducing the courts to great liberality in granting injunctive relief, most courts, treating the former as more important, have held that equity should, in such cases, act with unusual caution and consequently should extend its aid only in the clearest cases.[3] The unavoidable delay incident to such procedure,[4] together with the impotency of a court of equity to deal conclusively with the situation, in that having enjoined the collection of a tax it has no power to assess a new one,[5] has, therefore, induced legislation prohibiting the use of injunctions for such purposes.[6] Where, moreover, only part of a tax is illegal, similar considerations have caused the courts to require payment of the legal portion as a condition precedent to the relief sought.[7]

Subject, however, to this peculiar conservatism, the ordinary rules determinative of equitable jurisdiction and relief are applicable in cases of illegal taxation. Consequently, it is generally held that the mere irregularity or even illegality of the tax, whether it be on realty,[8] or on personalty,[9] affords no ground for interference. In order to invoke equitable aid, then, a complainant must show that he has an interest which is peculiarly threatened by the illegal tax[10] and also that the legal remedy provided for the redress of this wrong

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[27]Frost *v.* Shaw (1854) 3 Oh. St. 270.

[1]Stevens *v.* N. Y. & O. M. R. R. Co. (1875) 13 Blatch. 104; Cody *v.* Lennard (1872) 45 Ga. 85.

[2]Allen *v.* B. & O. R. R. Co. (1884) 114 U. S. 311.

[3]High, Injunctions §§ 484, 485; Waterbury Bank *v.* Lawler (1878) 46 Conn. 243.

[4]Cooley, Taxation 1423.

[5]State R. R. Tax Cases (1875) 92 U. S. 576.

[6]Snyder *v.* Marks (1883) 109 U. S. 189.

[7]Merrill *v.* Humphrey (1871) 24 Mich. 170; City Council *v.* Sayre (1880) 65 Ala. 564.

[8]Ogden City *v.* Armstrong (1897) 168 U. S. 224.

[9]Dows *v.* City of Chicago (1870) 11 Wall. 108. But see City of Delphi *v.* Bowen (1878) 61 Ind. 29.

[10]Robins *v.* Latham (1896) 134 Mo. 466.